Supreme Court, U.S.
FILED

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1997

MARGARET KIRK, As Administratrix of the
Estate of Elbert Kirk, Jr.,

and

MARGARET KIRK, Personally,

Petitioner,

v.

DELAWARE COUNTY SHERIFF'S DEPARTMENT,

and

DEPUTY DAVID BOOHER,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

KENNETH R. SPIERT
ATTORNEY AT LAW

1717 Bethel Road
Columbus, Ohio 43220
(614) 442-1520

COUNSEL FOR PETITIONER

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QUESTION PRESENTED

Whether the special relationship and/or state-created danger exceptions to the rule of *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989), are satisfied where, *inter alia,* a deputy sheriff had physical control of the intoxicated decedent for more than an hour, where the deputy had probable cause to arrest the decedent and had reason to believe he was intoxicated, where the deputy deliberately placed the decedent upon the highway in violation of a court order limiting the decedent's driving privileges, and where the decedent was killed in a collision a few minutes later.

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, Margaret Kirk, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above proceeding on August 19, 1997.

OPINIONS BELOW

The per curiam opinion of the Sixth Circuit Court of Appeals, *Kirk v. Delaware County Sheriff's Department*, Case No. 96-3915, 1997 WL 476533 (6th Cir. Ohio), unpublished, is reproduced in the Appendix at A-1. The order of the Sixth Circuit Court of Appeals denying Petitioner's petition for rehearing and for rehearing en banc is unreported, but is reproduced in the Appendix at A-3.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on August 19, 1997. The order denying the petition for rehearing and for rehearing en banc was entered on September 26, 1997. This petition was timely filed within ninety (90) days of that date.

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

This case involves Section One of the Fourteenth Amendment to the Constitution of the United States, which provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law;

nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner Margaret Kirk filed the instant action under 42 U.S.C. § 1983 on August 2, 1995, in her capacity as administratrix of the estate of Elbert Kirk, Jr. ("J.R. Kirk"), and as his surviving spouse. The complaint alleged that Defendant Booher, while acting under color of law as a deputy sheriff for Defendant Delaware County Sheriff's Department, wrongfully placed J.R. Kirk upon the highway while intoxicated and in violation of court orders suspending his driving privileges, resulting in J.R. Kirk's death.[1] Margaret Kirk asserted a claim against Defendant Delaware County alleging that J.R. Kirk's death was caused by the policies and customs of the Delaware County Sheriff's Department, including the failure adequately to train, supervise, and discipline deputies regarding investigation and detention of intoxicated drivers and person driving with suspended licenses. Margaret Kirk also presented pendant state law claims for survivorship and loss of support. The complaint sought compensatory and punitive damages.

The district court granted Defendants' motion for summary judgment by an Opinion and Order issued May 30, 1996. The court dismissed all of Margaret Kirk's claims. The Sixth Circuit Court of Appeals affirmed by way of a per curiam decision issued August 19, 1997. Margaret Kirk timely petitioned for re-hearing and for re-hearing en banc. The Sixth Circuit denied the petition on September 26, 1997.

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[1] The accident in which J.R. Kirk was killed also took the life of a passenger in another car and caused serious injuries to the driver of the other car.

On the morning of August 4, 1993, a fire broke out in Margaret Kirk's home. The fire was suspicious in origin and Margaret Kirk suspected that J.R. Kirk had set the fire. J.R. Kirk was at the scene throughout that morning and afternoon. A fireman on the scene reported that J.R. Kirk had been drinking and smelled of alcohol. Detective Askew reported that "J.R. appeared to be drunk. There was an odor of alcohol about him." (Askew Deposition, 20.) In fact, when J.R. Kirk indicated he wanted to drive an injured cat to the veterinarian, Detective Askew "advised J.R. that he wasn't going to drive. He was too shook up and he had been drinking." (*Id.*, 22.)

Margaret Kirk arrived home at about 5:35 p.m. J.R. Kirk was not at the scene at the time. He drove up a short time later and attempted to console Margaret Kirk. Upon seeing him, Margaret Kirk recognized immediately that J.R. Kirk was under the influence of drugs or alcohol. He smelled strongly of alcohol and his eyes were bloodshot. In his attempt to console Margaret Kirk, J.R. Kirk tried to pull her out of her car. This was interpreted by some of the firefighters, who had heard of the Kirks' domestic problems, as a possible "domestic situation." Unknown to Margaret Kirk, the firefighters called for law enforcement officers to assist with the perceived domestic situation.

Defendant Booher and Officer Hoover arrived at the scene in separate patrol cars at approximately 5:50 p.m. Defendant Booher noticed an odor of alcohol about J.R. Kirk's person. Hoover stated that he did not smell alcohol on J.R. Kirk, but admitted that he may have had a cold at the time. Hoover did state that J.R. Kirk's eyes were bloodshot. He also reported that Deputy Petrie, who was at the scene earlier, stated that he detected the odor of alcohol about J.R. Kirk and that his eyes were bloodshot at that time. Hoover testified on deposition that he

would have handled the situation differently than did Defendant Booher and that he would not have allowed J.R. Kirk to leave.

Defendant Booher controlled J.R. Kirk's freedom of movement while they were at the scene. This included keeping him away from Margaret Kirk, requiring him to sit down at a particular location, and prohibiting him from removing a motorcycle from the garage. According to Defendant Booher, J.R. Kirk was not free to leave the scene.

After learning that arson investigators were on the scene, J.R. Kirk began asking Hoover and Booher for permission to leave. Defendant Booher testified on deposition that J.R. Kirk began requesting his permission to leave between 6:15 and 6:30 p.m. Margaret Kirk wanted J.R. Kirk to leave the scene, but advised Defendant Booher that J.R. Kirk was drunk and that his license had been indefinitely suspended. J.R. Kirk responded by showing Defendant Booher a court order granting him limited driving privileges. Margaret Kirk advised Defendant Booher that J.R. Kirk's license was suspended after issuance of the limited driving privileges because of a subsequent OMVI arrest.

Perceiving what he believed to be an escalating "domestic situation," Defendant Booher resolved to remove J.R. Kirk from the scene. Rather than having J.R. Kirk's mother pick him up, as Detective Askew had done earlier, Defendant Booher told J.R. Kirk to leave the scene and drive to his mother's house.

According to Defendant Booher, J.R. Kirk was not free to drive away prior to Booher's confirming his driving privileges had not been suspended entirely. However, Defendant Booher placed J.R. Kirk on the highway before receiving that confirmation. Defendant Booher radioed the dispatcher to con-

firm the status of J.R. Kirk's driver license at 6:55 p.m. He then put J.R. Kirk on the highway before the dispatcher radioed back at 6:57 p.m. that J.R. Kirk's driving privileges had been suspended and that his limited privileges were no longer valid. Within minutes, J.R. Kirk was killed in a collision with another car. A post-mortem blood test revealed that J.R. Kirk's blood alcohol level was .183, nearly twice the legally presumptive level of intoxication in Ohio.

Before placing J.R. Kirk on the highway, Defendant Booher was aware of the following information: that J.R. Kirk had a drinking problem; that J.R. Kirk smelled of alcohol; that a civil protection order had been issued prohibiting J.R. Kirk from being at the Kirk residence; that J.R. Kirk had been granted limited driving privileges by a court order dated May 28, 1993; that his authorizing J.R. Kirk to drive violated the limitations of that order; that Margaret Kirk, an attorney with experience in criminal matters, had informed him that J.R. Kirk's purported limited driving privileges were no longer valid because he had been charged with a subsequent OMVI and received a notice of license suspension a few days before this incident; and, that Margaret Kirk, who had been married to J.R. Kirk for over ten years and was clearly in a position to evaluate J.R. Kirk's condition, believed J.R. Kirk to be intoxicated.[2]

Defendant Booher did not conduct any field sobriety tests despite the fact he was on notice of J.R. Kirk's possible intoxication. Neither did he employ any readily available alternatives to placing J.R. Kirk upon the highway. Notwithstanding that J.R. Kirk was at the scene in violation of the civil protec-

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[2] Margaret Kirk's reliability is demonstrated by the fact that her statements to Defendant Booher regarding J.R. Kirk's intoxicated condition and the indefinite suspension of his driver license were proven by the post mortem blood test and official records to have been accurate.

tion order and that he drove there in violation of the court order that Booher ultimately relied upon as authority for authorizing him to drive, Defendant Booher believed he had no probable cause to detain J.R. Kirk.

BASIS FOR FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE

The district court had subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343(3). Petitioner's claims are based upon violations of constitutional rights under 42 U.S.C. § 1983. The Sixth Circuit Court of Appeals had appellate jurisdiction under 28 U.S.C. § 1291.

REASONS FOR GRANTING THE WRIT

The Court should grant the writ in order to resolve the conflict among the circuits regarding the two exceptions to the rule enunciated in *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 197 (1989), that the substantive due process component of Fourteenth Amendment does not confer upon citizens the right to state protection from wrongs committed by private parties. *Braxton v. United States*, 500 U.S. 344 (1991) (the principal purpose of certiorari jurisdiction is to resolve conflicts among the Circuit Courts of Appeals and state courts on federal law). *DeShaney* provides that a substantive due process right to protection arises in two limited circumstances: first, where the state affirmatively restrains the individual's freedom to act "through incarceration, institutionalization, or other similar restraint of personal liberty;" and, second, where the state creates a danger to the individual or renders the individual more vulnerable to danger. *DeShaney, 489 U.S.* at 200 and 201, respectively. The circuits have applied conflicting standards and reached differing results when analyz-

ing both the "special relationship" exception and the "state-created danger exception." This Court must grant review in order to more clearly define the contours of those exceptions and put to rest the conflicts now dividing the circuits.[3]

The decision below conflicts with those of other circuits as to the two exceptions to the *DeShaney* doctrine. First, the decisions are in conflict as to what circumstances are necessary to demonstrate a sufficient custodial or otherwise "special" relationship so as to give rise to a constitutionally protected right. Some courts recognize a substantive due process right outside the strictly custodial context, while other courts limit that recognition solely to custodial situations. For cases recognizing the right in situations short of actual or "functional" custody, *see*, e.g., *Gazette v. City of Pontiac*, 41 F.3d 1061, 1065 (6th Cir. 1994) ("[o]utside of the custodial setting, we have recognized that police actions may give rise to a special relationship with a criminal or a victim that can create Section 1983 liability"); *Gregory v. City of Rogers*, 974 F.2d 1006, 1010 (8th Cir. 1992) (en banc), *cert. denied*, 507 U.S. 913 (1993) (recognizing that a special relationship exists both "in custodial and other settings in which the state has limited the individuals' ability to care for themselves"); *accord Hilliard v. City and County of Denver*, 930 F.2d 1526, 1520 (10th Cir.), *cert. denied*, 502 U.S. 1013 (1991) (observing that it is unclear whether a substantive due process right exists "where there is no element of state-imposed confinement or custody"); and *Stemler v. City of Florence*, 126 F.3d 856, 857-58 (6th Cir. 1997) (custodial relationship was created where officers affirmatively restrained the victim by physically placing her against her will in a vehicle driven

[3] The courts have expressed the need for such clarification. *See*, e.g., *Wyke v. Polk County School Board*, 129 F.3d 560, 567 (11th Cir. 1997) ("[e]xactly what type of state action fits within [the state-created danger] exception has been the subject of considerable debate since DeShaney").

by her abusive, intoxicated former boyfriend and threatening to arrest her if she did not comply). For cases strictly limiting the right to custodial situations, *see*, e.g., *Pinder v. Johnson*, 54 F.3d 1169, 1175 (4th Cir. 1995) ("[t]his Court has consistently read *DeShaney* to require a custodial context before any affirmative duty can arise under the Due Process Clause"); and *Wyke v. Polk County School Board*, 129 F.3d 560, 566 (11th Cir. 1997) (a duty to protect arises only where there is "a custodial relationship between the injured individual and the state").

The circuits have also reached inconsistent results regarding the state-created danger exception to the *DeShaney* rule.[4] For cases recognizing a right to protection based upon state-created danger or enhancement of the citizen's vulnerability to a particular danger, *see*, e.g., *Reed v. Gardner*, 986 F.2d 1122, 1126 (7th Cir. 1993) (where an officer removed a sober driver and left behind one whom he knew to be drunk with the keys in the car, such "state intervention created the dangerous condition, a drunk driver on the road"); *Kneipp v. Tedder*, 95 F.3d 1199, 1208-10 (3rd Cir. 1996) (the affirmative acts of the police officer, who sent a drunken pedestrian home "unescorted in a visibly intoxicated state in cold weather" after having previously dispatched her escort, greatly increased the danger or risk of injury). *See also Dwares v. City of New York*, 985 F.2d 94, 99 (2nd Cir. 1993) ("an allegation that the officers in some way had assisted in creating or increasing the danger to the victim would implicate [the victim's rights under the Due Process Clause]. . . . [A] prearranged official sanction of privately in-

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[4] The state-created danger exception is a separate and distinct exception to the *DeShaney* rule. *Kneipp v. Tedder*, 95 F.3d 1199, 1209, n. 22 (3rd Cir. 1996) ("We view the 'state-created danger' relationship to be different than the 'special relationship' required by DeShaney to impose liability under section 1983").

flicted injury" violates substantive due process); *Freeman v. Ferguson*, 911 F.2d 52, 54-55 (8th Cir. 1990) (involving an "affirmative act by a state actor to interfere with the protective services which would have otherwise been available in the community - with such interference increasing the vulnerability of [the victim]"); *Lewis v. Sacramento County*, 98 F.3d 434 (9th Cir. 1996), *cert. granted sub nom. County of Sacramento v. Lewis*, 117 S.Ct. 2406 (1997) (police officer created danger to passenger on motorcycle when officer initiated high-speed chase resulting in passenger's death);[5] *Wood v. Ostrander*, 879 F.2d 583 (9th Cir. 1989) (trooper affirmatively placed citizen in position of danger by arresting her companion, impounding the vehicle, and leaving her stranded in a high crime area); and *Cornelius v. Town of Highland Lake*, 880 F.2d 348 (11th Cir. 1989) (the state affirmatively created the danger where a town clerk was terrorized by inmates on a community work squad program). For cases with inconsistent results, *see Foy v. City of Berea*, 58 F.3d 227, 230, 232 (6th Cir. 1995) (rejecting plaintiff's state-created danger argument and concluding that "[n]either the Supreme Court nor this court has announced a clearly established right of persons not in custody or incarcerated to recover for a substantive due process violation because the police permitted them to go on their way after a brief encounter"); and *Gregory*, 974 F.2d at 1011 (concluding that, even if the officer knew the victims were drunk when left alone outside the station house in a car, with its keys, while the "designated driver" was being arrested inside, no reasonable

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[5] *Lewis* presents the issue of what standard should apply to the conduct of law enforcement officers in the context of high-speed chases - a particular species of the state-created danger doctrine. The petitioner's brief in *Lewis* relies upon *DeShaney*. Because the scope of *DeShaney* and its exceptions are implicit in the resolution of *Lewis*, the Court should stay a ruling on the instant petition pending the decision in *Lewis*.

trier of fact could have found the officer affirmatively placed the victims in danger).

The Sixth Circuit disposed of the instant case by applying its rationale in *Foy*, 58 F.3d 227.[6] However, the *Foy* court's analysis is inadequate in two respects.[7] First, its analysis of the special relationship exception is overly restrictive in that it limits the exception to "official custody" situations. Describing the *DeShaney* rationale, the *Foy* court stated, "[t]he victim in *DeShaney* was not in official custody and thus there was no special relationship." *Foy*, 58 F.3d at 231. Second, the court rejected the plaintiff's state-created danger claim out of hand and completely failed to analyze this exception. By applying *Foy* in the instant case, the court failed properly to consider Margaret Kirk's claims regarding the exceptions to the *DeShaney* rule.

Because J.R. Kirk was in Defendant Booher's custody or was in a special relationship with Defendants when Defendant

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[6] "[W]e affirm the order of the district court on the reasoning set out in [its] opinion and on the authority of our recent decision in *Foy v. City of Berea*, 58 F.3d 227 (6th Cir. 1995)." August 19, 1997 per curiam decision.

[7] In addition to these analytical deficiencies, *Foy* is also factually distinguishable from the instant case. Unlike *Foy*, the encounter between J.R. Kirk and Defendant Booher was not a brief one; it lasted slightly more than an hour. Defendant Booher spoke with J.R. Kirk several times during that encounter and controlled his actions and restricted his freedom of movement. J.R. Kirk was not free to leave until Defendant Booher verified the status of his driving privileges. Also, unlike *Foy*, Defendant Booher affirmatively placed J.R. Kirk on the highway, in harm's way, whereas the officer in *Foy* did not order the parties to drive on the highway or otherwise limit their ability to protect themselves. By placing J.R. Kirk on the highway in violation of two court orders, Defendant Booher deliberately and arbitrarily exercised his authority as a governmental agent. Finally, the accident in the instant case was proximate in time and location to the encounter with Defendant Booher whereas, in *Foy*, the accident occurred more than forty-five (45) minutes after the encounter and many miles away.

Booher ordered him onto the highway, the Fourteenth Amendment imposed upon Defendants an affirmative duty of protection. *DeShaney*, 489 U.S. at 200. Official custody or "other similar restraint of personal liberty" is sufficient to create such a relationship. *Id.* Physical restraint and limitations on movement are sufficient to create a custodial relationship. *Stemler*, 126 F.3d at 867-69.

The following facts compel the conclusion that J.R. Kirk was in Defendants' custody or, at least, that a special relationship had been created. First, Defendant Booher controlled and limited J.R. Kirk's movements and activities for slightly more than an hour. Defendant Booher and Officer Hoover were called to the scene by firefighters who believed that a "domestic situation" was beginning to develop between Margaret Kirk and J.R. Kirk and these officers proceeded to direct and limit J.R. Kirk's movements at the scene. This included orders to stay away from Margaret Kirk, to sit down at a particular location, and not to remove a motorcycle from the garage. In addition, J.R. Kirk complied with those orders from the time the officers arrived at the scene (approximately 5:50 p.m.) until he became nervous after learning that arson investigators were at the scene. At that time, between 6:15 to 6:30 p.m., J.R. Kirk began requesting permission to leave the scene in his car. Likewise, consistent with J.R. Kirk's perception that he was not free to leave without Defendant Booher's permission, Defendant Booher testified on deposition that J.R. Kirk was not free to drive away prior to Defendant Booher's confirming his driving privileges had not been suspended entirely.[8] These limitations on

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[8] Despite this fact, Defendant Booher ordered J.R. Kirk to leave the scene prior to receiving confirmation of J.R. Kirk's license from the dispatcher. He called the dispatcher for this information at 6:55 p.m., but authorized J.R. Kirk to leave prior to the dispatcher radioing him at 6:57 p.m. that J.R. Kirk's driving privileges had been suspended because of a more recent OMVI arrest

J.R. Kirk's freedom of movement are sufficient to constitute custody or, at least, functional custody. *Accord Stemler*, 126 F.3d at 867-69.

Furthermore, Defendant Booher was aware at the time that a civil protection order had been issued prohibiting J.R. Kirk from being at Margaret Kirk's residence. He was also aware that the order purportedly granting limited driving privileges, which he relied upon when ordering J.R. Kirk upon the highway, did not permit him to drive to Margaret Kirk's residence. Hence, Defendant Booher had probable cause to arrest J.R. Kirk for a violation of either or both of these court orders.[9] Accordingly, there existed a sufficient relationship to give rise to a duty to protect J.R. Kirk.

Defendant Booher's decision to place J.R. Kirk upon the highway constitutes affirmative conduct by a state actor which created a danger to J.R. Kirk and rendered him vulnerable to that danger. *Reed*, 986 F.2d at 1126; and *Kneipp*, 95 F.3d at 1208-10. Defendant Booher affirmatively placed J.R. Kirk upon the highway, in harm's way, without taking any steps to protect him. By doing so, Defendant Booher violated the terms of the court order upon which he relied as justification for allowing J.R. Kirk to drive. He placed J.R. Kirk in danger with-

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and that the order granting limited driving privileges was no longer valid. Within minutes, J.R. Kirk was killed in a collision with another car.

[9] Defendant Booher also had sufficient cause to inquire into whether J.R. Kirk was intoxicated prior to placing him on the highway. Defendant Booher smelled the odor of alcohol about J.R. Kirk. Officer Hoover and Deputy Petrie noticed that J.R. Kirk's eyes were bloodshot. Margaret Kirk, J.R. Kirk's wife of ten years and a reliable informant (being an experienced criminal defense attorney), advised Defendant Booher that J.R. Kirk was very intoxicated. Nonetheless, Defendant Booher performed no field sobriety tests. Nor did he employ any readily available alternatives to placing J.R. Kirk on the highway.

out waiting to receive confirmation of the status of J.R. Kirk's driving privileges. This action constitutes a deliberate and arbitrary exercise of governmental authority. *Collins v. City of Harker Heights*, 503 U.S. 115, 127, n. 10 (1992); *Daniels v. Williams*, 474 U.S. 327, 331 (1986); *also see Reed*, 986 F.2d 1122, and *Kneipp*, 95 F.3d 1199. J.R. Kirk lost his life as a result of this arbitrary conduct.

J.R. Kirk was exposed not merely to private action or mere negligence, but to a deliberate, affirmative act by an official acting under color of law who "interfere[d] with protective services which would otherwise have been available . . . with such interference increasing [his] vulnerability. *Freeman*, 911 F.2d at 54. Two courts of the state of Ohio had issued orders suspending J.R. Kirk's driving privileges because of his drunken driving. These were intended to protect J.R. Kirk and the public from his drunken driving. The Ohio Supreme Court has stated that "the state has a paramount interest in promoting public safety by removing drunk drivers from the highways." *Doyle v. Ohio Bureau of Motor Vehicles*, 51 Ohio St. 3d 46, 554 N.E.2d 97 (1990). Nonetheless, Defendant Booher deliberately violated one of those orders, and should have known he was violating the other, by authorizing J.R. Kirk to drive. Defendant Booher thereby deprived J.R. Kirk of the protective measures the state had already put in place to protect him.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests this Court to grant the writ and order the Sixth Circuit Court of Appeals to certify the record herein to this Court for review. Further, Petitioner respectfully requests the court to stay proceedings on the instant petition pending the decision in *County of Sacramento v. Lewis*, Case No. 96-1337, *cert. granted*, __ U.S. __, 117 S.Ct. 2406 (1997), see n. 5, *supra*.

Respectfully submitted,

Kenneth R. Spiert
Attorney at Law

1717 Bethel Road
Columbus, Ohio 43220
(614) 442-1520

COUNSEL FOR PETITIONER

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1997

MARGARET KIRK, As Administratrix of the Estate of Elbert Kirk, Jr.,

and

MARGARET KIRK, Personally,

Petitioner,

v.

DELAWARE COUNTY SHERIFF'S DEPARTMENT,

and

DEPUTY DAVID BOOHER,

Respondents.

APPENDIX

No. 96-3915

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MARGARET KIRK,	)	
	)	
Plaintiff-Appellant,	)	
	)	ON APPEAL FROM
v.	)	THE UNITED STATES
	)	DISTRICT COURT FOR
DELAWARE COUNTY	)	THE SOUTHERN
SHERIFF'S DEPARTMENT;	)	DISTRICT OF OHIO,
DAVID BOOHER, DEPUTY,	)	EASTERN DIVISION
	)	
Defendants-Appellees.	)	

BEFORE: NORRIS and BATCHELDER, Circuit Judges; ALDRICH, District Judge.

PER CURIAM. The plaintiff brought this action pursuant to 42 U.S.C. § 1983 against a deputy sheriff of Delaware County, Ohio and the County, claiming that the defendants violated their duty to protect her husband. The plaintiff claims that her husband's death in an automobile accident was the result of the deputy's knowingly permitting him to drive while intoxicated and on a suspended license. The district court granted summary judgment to the defendants, concluding that the deputy's conduct did not deprive the decedent of any right established by the Constitution of laws of the United States, and that even if it did, such a right was not clearly established at the time of the deputy's actions. The court further held that the plaintiff had failed to establish that the defendant County had a policy, custom or practice that caused injury to the decedent. The plaintiff appealed the district court's order.

After careful review of the record in this case, the applicable law, counsels' arguments and the district court's opinion,

we conclude that the district court did not err in granting summary judgment. Because the district court thoroughly analyzed plaintiff's contentions in its memorandum opinion, we believe that the issuance of a full written opinion in this case would be duplicative and would serve no useful purpose. Therefore, we affirm the order of the district court on the reasoning set out in that opinion and on the authority of our recent decision in *Foy v Berea*, 58 F.3d 227 (6th Cir. 1995).

No. 96-3915

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MARGARET KIRK,	)	
	)	
Plaintiff-Appellant,	)	
	)	ORDER
v.	)	
	)	
DELAWARE COUNTY SHERIFF'S DEPARTMENT; DAVID BOOHER, DEPUTY,	)	
	)	
Defendants-Appellees.	)	

BEFORE: NORRIS and BATCHELDER, Circuit Judges; ALDRICH, District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF
THE COURT

Leonard Green, Clerk

AMENDMENT XIV, SECTION ONE

UNITED STATES CONSTITUTION

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Code Annotated (West 1997).

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

United States Code Annotated (West 1997).